UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WESTERN CAB COMPANY

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC

Cases 28-CA-131426
28-CA-132767
28-CA-135801

CHARGING PARTY'S REPLY TO RESPONDENT WESTERN CAB COMPANY'S RESPONSE

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UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

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In accordance with Section 102.46 of the National Labor Relations Act, the Charging Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("Union") submits this Reply to Respondent Western Cab Company's ("Western" or "Company") Response to Charging Party's Brief in Support of Exceptions to the Decision and Recommended Order of the Administrative Law Judge ("Response").[1]

I. INTRODUCTION

Western's Response to the Union's Exceptions provides no basis for affirming Administrative Law Judge ("ALJ") Sotolongo's errors in his Decision and Recommended Order ("ALJD"). Western notes that it furnished information about the over 100 employees that it unilaterally disciplined, but ignores the core issue of this case: its duty to notify the Union before it unilaterally implemented discretionary discipline. Western contends that the Union waived the right to bargain about the discipline, but sidesteps the well-established doctrine that when the employer's action presents a *fait accompli*, waiver is impossible. It fails to address cases and law cited by the Union as support for why restoration of the *status quo* is the only appropriate relief. It mischaracterizes the Union's Exceptions as credibility arguments. And, it throws in a First Amendment argument that ignores Section 8(c)'s limits on coercive employer conduct.

II. ARGUMENT

A. Restoration of the *Status Quo* Is the Appropriate Remedy for Western's Unilateral Imposition of Discretionary Discipline.

Western mounts a barrage of arguments about why reinstatement and backpay are not the proper remedies for the unlawfully-implemented disciplines, but none of its shots reach the heart of the matter. It has not provided evidence showing that the employees actually committed the

[1] Citations to the Union's Brief in Support of Exceptions will be "Union Brief ____."

offenses and, furthermore, it fails to fully address the Union's arguments why Section 10(c) does not prohibit restoration of the *status quo*. Although the Union's arguments and ALJ's Decision use *Alan Ritchey* for persuasive, rather than precedential value, Western expounds at length why that decision is wrong, without addressing other underlying precedent about the duty to bargain over mandatory subjects.

1. There is no record evidence that the employees actually committed the offenses of which they are accused.

Western's assertion that employees were terminated "for cause" misinterprets that term of art as it is used in Section 10(c), discussed further below. (*See also* Union Brief at 16-22). It also assumes, without evidence, that employees actually committed the offenses of which they are accused. Moreover, this argument amounts to an affirmative defense which was not pled in the answer to the consolidated complaint, *see* GC Exh. 1(q), or specifically argued in Western's Post-Hearing Brief. The party asserting an affirmative defense bears the burden of proof. *Hartford Head Start Agency, Inc.*, 354 NLRB 164, 184 (2009). Here, because Western provided no evidence that employees committed the offenses of which they are accused, the burden has been abandoned and cannot form the basis for why restoration of the *status quo*, in the form of reinstatement and backpay, is inappropriate.

2. The Company's reading of Section 10(c) is too narrow and neglects precedential definitions of its meaning.

Under Western's reasoning, Section 10(c) would prohibit reinstatement and backpay unless the disciplinary action also violated Section 8(a)(3). Such logic would scrape the Act to the bone by allowing employers to act as they please, so long as such action does not also violate Section 8(a)(3).

Furthermore, Western disregards the Board's explicit statement that, "[c]ause, in the context of Sec. 10(c), effectively means *the absence of a prohibited reason.*" *Taracorp Industries*, 273 NLRB 221, 222 fn. 8 (1984)(emphasis added). Here, the prohibited reason is the change itself: Western's imposition of discretionary discipline without having bargained. Thus, a prohibited reason is not only *present* but also the very reason why the discipline happened in the first place. (*See* ALJD at 11:20-22; Union Exception No. 9). In this context, Section 10(c) does not bar the path to restoration of the *status quo* via reinstatement and backpay.

Western wholly fails to address the Union's argument that *Anheuser-Busch* is distinguishable from the instant case because that employer enforced an already-existing rule via unlawfully-implemented means. The *Anheuser-Busch* Board itself was careful to note that the dissent relied upon cases distinguishable from the facts because, in at least one of the dissent's cases, the "discipline for employee action [] would have been acceptable action *absent the employer's unlawful unilateral change in conduct rules.*" 351 NLRB 644, 649 fn. 18 (2007) (emphasis added). Thus, the Board was aware of the distinction between unlawful and lawfully-implemented rules. Yet, Western argues that *Uniserv* does not limit *Anheuser-Busch*'s holding even though it presents that precise distinction. (Response at 27). In *Anheuser-Busch*, the discipline was the result of a lawful rule, without regard to the method of detection. Reinstatement and backpay were not appropriate. Where, however, the discipline was the result of an *unlawful* rule, rescission of the discipline and restoration of the *status quo* was required to remedy the violation. *Uniserv*, 351 NLRB 1361 (2007). Neither case conflicts with the other in this respect.

Western also grossly overstates *Anheuser-Busch*'s overruling of *Tocco*, 323 NLRB 480 (1997), and *Great Western Produce, Inc.*, 299 NLRB 1004 (1990). The Board specifically stated

that *Tocco* and *Great Western* were only overruled "to the extent that they hold that an employer may not discipline employees for uncontested misconduct *if that misconduct is detected through unilaterally and unlawfully implemented means*." *Anheuser-Busch*, 351 NLRB at 645 (emphasis added). *Anheuser-Busch*, therefore, does not overrule those two cases insofar as they find that make-whole relief is appropriate when, as here, an employer unlawfully implements a rule that led to the discipline. In *Tocco* and *Great Western*, the change was the rule itself. *See also Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (the "vice" is the change). Thus, Western's attempt to read *Anheuser-Busch* to overrule the very violation which it has committed here is also an attempt to distract the Board from the violation. Additionally, it fails to explain why restoration of the *status quo* should not be granted.

3. *Status quo* can be restored without reliance on *Alan Ritchey*.

Western spends ample pages criticizing *Alan Ritchey*. (Response at 4-7; 13-14; 24-27). But, this case can be decided without reliance on *Alan Ritchey* for precedent. (*See* Union Brief at 7-10). Here, all the Company's discipline was discretionary. (Tr. 38-40, 78-79). All material, substantial, and significant changes through discipline—such as suspensions and terminations—had to be bargained with the Union. The failure to bargain over these changes is a violation of Section 8(a)(5) and "it is [customary] to order restoration of the *status quo ante* to the extent feasible." *Daily News of Los Angeles*, 315 NLRB at 1241, *citing Allied Products Corp*., 218 NLRB 1246, 1246 (1975), enfd. 548 F.2d 644 (6th Cir. 1977).

Curiously, Western favorably cites *Alan Ritchey* when it states that the disciplines were made "under exigent circumstances," which was one of the exceptions to the obligation to bargain the Board in recognized *Alan Ritchey*. (Response at 18). Western, however, has not presented any evidence regarding those exigencies and, therefore, cannot carry its burden of

proof on that issue. On a related note, Western implies that *Alan Ritchey* was a faulty decision because it presented a "myriad of exceptions" to the obligation to bargain over discretionary discipline[2] before imposition. (Response at 13). If anything, these exceptions show the Board considered extant law when it decided *Alan Ritchey*. Only *Fresno Bee* conflicts with *Alan Ritchey* and, for the reasons stated in the Union Brief (and wholly unaddressed by Western), that decision should be overruled and the Board should accept the *Alan Ritchey* rationale. (*See* Union Brief at 11).

As noted in *Alan Ritchey*, bargaining over discretionary discipline in the interim between certification and first contract furthers the goals of the Act because, if employers can continue to issue discretionary discipline after certification, then "the employees might reasonably conclude that their statutory rights are illusory." *Alan Ritchey*, 359 NLRB No. 40, slip op. at 10 (2012). The Board can re-affirm this principle here, holding that discretionary discipline must be bargained until a contract is in place and thereby allow unions to provide representation to employees who have lawfully exercised their Section 7 rights during this critical period.

Finally, Western's allegation that *Alan Ritchey* imposes the negotiation of contract terms is similarly unfounded. (Response at 13). *Alan Ritchey* sought to follow Board precedent by requiring bargaining over discretionary changes to terms and conditions of employment during the interim between certification and a first contract—no particular term is imposed and, indeed, imposition of terms is outside of the Board's power. What Western perhaps protests is that this

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[2] Western's statement that the idea of "non-discretionary discipline" is "illusory because almost all discharges require the exercise of some discretion" is groundless and without merit. (Response at 13). The fact that Western had only discretionary discipline does not render the existence of non-discretionary discipline impossible. Non-discretionary discipline could exist in a variety of ways, such as a zero-tolerance drug policy with drug testing after every accident; a rule that suspends an employee after 3 absences and terminates her after 5; or a practice of suspending any driver with low book for a certain number of shifts. Western's discipline was all discretionary because that was Western's *choice*, not because non-discretionary discipline is an unattainable goal.

Western also implies that not all of its discipline was discretionary because it required drivers to sign documents stating they understood Nevada's anti-diversion statute. (Response at 7-8). No employees, however, were disciplined for violating that law. It is irrelevant.

hinders an employer's ability to act unilaterally regarding mandatory subjects of bargaining. This is hardly the imposition of contract terms and, moreover, is specifically what the Act is designed to do: obligate employers to bargain with unions over mandatory subjects.

B. Western Completely Ignores the Doctrine of *Fait Accompli*.

Western hangs its hat on the Union's failure to demand bargaining over suspensions and terminations that were implemented without notice. (Response at 18-24). This argument disregards well-established case law. Specifically, when an employer makes a unilateral change to a mandatory subject of bargaining without notice and, therefore, a meaningful opportunity to bargain, the union's failure to request bargaining will not constitute a waiver. *Pontiac Osteopathic Hosp.*, 336 NLRB 1021, 1023 (2001); *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986), *quoting Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983). In short, each instance of discipline that Western imposed was a *fait accompli*. By overlooking the detail that notice is necessary to trigger a demand to bargain, Western's argument becomes hollow. And, the cases it cites are irrelevant; in those cases, the employer provided notice before making the change.

Western inaccurately claims that it provided prior notice about the disciplinary decisions to Teffera, a member of the bargaining committee. Western misstates Teffera's testimony and suggests his knowledge of the suspensions and terminations was due to communication with the Company. As Teffera testified without contradiction, however, it was only *drivers* who notified him of their discipline:

> Q (by Counsel for the General Counsel): Now, how many times—during your times in negotiations, how many times did the company inform the union with you present at they were going to terminate a driver?

A (by Teffera): When? Every time. **But the company not tell me, <u>the drivers they tell me they fired</u>.** After they're fired they come to me, they told me they fired them by mobile, by accident, different kinds of things.

. . .

Q: So you found out from the drivers. How many times did the company tell you before they fired a driver?

A: Never them tell me. Never.

Q: During your time in negotiations how many times did the company tell the union with you present that they were going to suspend a driver?

A: Never.

(Tr. 188-189) (emphasis added). Furthermore, as the testimony shows, Teffera never received notice *before* the discipline was implemented. Thus, even the paltry and nonexistent notice referenced by the Company was insufficient.

The Company's reliance on *Security Walls, LLC* is entirely unfounded. 361 NLRB No. 29 (Aug. 29, 2014). In that case, the Board never reached the disciplinary issue because it determined that there were genuine issues of material fact, making summary judgment inappropriate. *Id*., slip op. at 2. Furthermore, that case can be distinguished from the instant matter because the employer alleged that there was an interim grievance procedure in place which, under *Alan Ritchey*, would relieve an employer of its bargaining obligation. Here, there is no such mechanism.

Western's argument collapses under the weight of well-established Board law and unrebutted testimony. Western provided no prior notice to any Union officer, representative, or member before it suspended and terminated employees based on discretionary discipline. Furthermore, the Union only received notice of the disciplines because it specifically requested that information—not because the Company provided notice, as required by law. Western seeks

congratulations for obeying the law with regard to its provision of information and having that compliance remedy its failure to provide notice.[3] This cannot stand.

C. The ALJ Erred by Not Finding Any Section 8(a)(1) Violations.

Western mischaracterizes the Union's Exceptions related to the prohibition on the distribution of *Trip Sheet* Magazine and Grigorov's unlawful interrogation of bargaining-unit employee Joan Young as credibility arguments while ignoring the substances of those Exceptions. It also provides no basis for finding that Moran's comments to Teffera were not a Section 8(a)(1) violation.

1. The errors related to Grigorov's, Sarver's, and Young's comments were not based on credibility issues.

Western mischaracterizes the Union's Exceptions related to the ALJ's refusal to find Section 8(a)(1) violations in the prohibition on the distribution of *Trip Sheet* magazine and Grigorov's interrogation as "credibility issues." (Response at 27-31). The contradiction between Sarver and Young's testimony about the availability of *Trip Sheet* magazine, however, is not a credibility issue. An ALJ's findings should not be affirmed when the credibility finding conflicts with a clear preponderance of evidence. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950); *see also Sasol N.A. Inc. v. NLRB*, 275 F.3d 1106, 1112 (D.C. Cir. 2002) ("While an agency's credibility decision normally enjoys almost overwhelming deference, it does not do so when it rests explicitly on a mistaken notion.").

The ALJ found Young to be "generally credible," and noted that Young could not address Sarver's testimony about the availability of the magazine before Young started working

[3] Western also attempts to gain purchase with the Board by stating that it "affirmatively offered to bargain with the Union" over the already-implemented disciplines. (Response at 4) (emphasis omitted). But an offer to bargain after a change has already been implemented without notice is like begging forgiveness instead of asking permission. Furthermore, Western's argument disregards the important rights that are protected by obligating an employer to bargain with a newly-certified union prior to implementing discretionary discipline.

for Western in June 2013. After having found both witnesses credible, however, ALJ Sotolongo gave Sarver's testimony about banning the magazine from Western's premises more weight than Young's testimony that the magazine was, in fact, available on a regular basis from June 2013 up to August 2014. The ALJ also ignored his finding that Sarver testified that the magazines could be "dropped off," "suggesting that TS magazine had not honored her request to stop delivering magazines at Respondent's premises." (ALJD at 5). This is a fact, not credibility, issue and deference is not required for the ALJ's mistaken notion about the availability of the magazine after June 2013.

As for Grigorov's comments, the ALJ determined that Young credibly testified that he told her "you don't need a union" and asked "What do you need a union for?" (ALJD at 6). The only comment deemed incredible was whether Grigorov asked, "Why do you need a union?," because the ALJ determined that Grigorov asked, "Why do you need a meeting?"—which, from the context, is a union meeting. (*Id*.). Neither of these determinations conflict with the Union's argument that the statements are coercive and violations of Section 8(a)(1). (*See* Union Brief at 25-26). The interrogation should be considered within the context of the instant unfair labor practices and ongoing bargaining.

2. Moran's comments disparaged the Union.

Notably, the Company tries to have its cake while simultaneously eating its cake by urging the Board to accept the ALJ's credibility determinations regarding Sarver and Young, while ignoring his determination to credit Youngmark's testimony about Moran's statements to Teffera during the February 4, 2014, bargaining session. (*See* Western's Response at 36 fn. 20). It then mounts a First Amendment argument while failing to distinguish any of the cases upon which the Union relies.

The Company's First Amendment argument, however, must fail. Section 8(c) states that views can be freely shared as long as "such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). But, Moran's statements about the family's unwillingness to change is the reason why the ALJ erred when he determined that the comments were not violations of Section 8(a)(1). An employer violates Section 8(a)(1) when it denigrates the union and conveys the idea that continued union representation would be futile. *Regency House of Wallingford, Inc.*, 356 NLRB No. 86, slip op. at 5 (2011), *citing Billion Oldsmobile Toyota*, 260 NLRB 745, 754 (1982). Here, Moran's comments were couched within her discussion about the family's unwillingness to "change" and accept unionization—the only conclusion to be drawn from these comments is that, in spite of union representation, the Company will continue to do as it pleases because it does not want to change. These comments were made at the bargaining table, after two years of bargaining had not led to an agreement. The facts, thus, indicate that Western did refuse to change and Moran's comments conveyed the futility of union representation. This is unlawful.

III. CONCLUSION

For the reasons stated above, the Union respectfully requests that the ALJ's Decision and Recommended Order be modified as explained in the Union's Brief in Support of Exceptions. The Union continues to request the Board to consider hearing oral argument in this case.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the CHARGING PARTY'S REPLY TO RESPONDENT WESTERN CAB COMPANY'S RESPONSE was served via electronic mail this 12th day of November, 2015, upon

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